Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

RICHARD E. PROVOST,
Petitioner,
v.
STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

SHEILA A. HUDDLESTON
(Counsel of Record)
JAMES W. BERGENN
MORGAN P. RUECKERT
SHIPMAN & GOODWIN LLP
One American Row
Hartford, Connecticut 06103
(860) 251-5000
Counsel for the Petitioner

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QUESTION PRESENTED

In 1994, medical personnel asked the mother and aunt of a nine-year-old girl with a yeast infection whether the girl was sexually active. Prompted by that inquiry, the girl's aunt questioned her, alone and at length, and drew out a "disclosure" that "Rick" had "hurt her." The Petitioner, Rick Provost, had previously dated the girl's mother, but had not seen the girl or her mother since 1991. As a result of the "disclosure," he was arrested and tried for sexual assault in the first degree and risk of injury to a child.

At the Petitioner's trial in 1995, out of the jury's presence, the prosecutor revealed that the girl had recently made allegations of sexual misconduct by several family members – including her aunt's ex-husband, teenaged nephew, and an adult cousin also named "Rick." No evidence of the girl's allegations against family members was admitted at trial. The prosecutor thereafter argued in summation that the jury could believe the defendant was guilty because there was no evidence that the girl's aunt had any motive to "feed something" to the girl to "cover" for any family member.

In the circumstances of this case, does the guarantee of due process in the Fifth and Fourteenth Amendments prohibit a prosecutor from misleading the jury on an issue critical to the State's case by emphasizing, in summation, the absence of evidence that the prosecutor knows to exist?

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PETITION FOR A WRIT OF CERTIORARI

Richard E. Provost respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Connecticut Supreme Court and the dissenting opinion of Justices McDonald and Berdon are reported at 251 Conn. 252, 741 A.2d 295 (1999) and are reprinted in the appendix hereto at 1a. The opinion of the Connecticut Appellate Court is reported at 49 Conn. App. 56, 713 A.2d 879 (1998) and is reprinted in the appendix hereto at 21a.

The Connecticut Supreme Court's Order of February 10, 2000 denying the Petitioner's Motion for Reargument and Reconsideration, and in the Alternative, for Reargument and Reconsideration En Banc is not reported and is reprinted at in the appendix hereto at 33a.

JURISDICTION

The opinion of the Connecticut Supreme Court was officially released on November 30, 1999. A timely Motion for Reargument and Reconsideration, and in the Alternative, for Reargument and Reconsideration En Banc was denied by an order entered on February 10, 2000, but notice of that order was not issued until March 9, 2000. On April 28, 2000, this Court granted an extension of time within which to file this petition to June 9, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

This case involves a child's long-delayed "disclosure" of alleged sexual abuse. The "disclosure" was the product of extensive questioning by the child's aunt. At the Petitioner's trial, the State's evidence consisted of minimal and vague testimony by the child M[1] – elicited through leading questions – and more detailed "constancy of accusation" testimony by M's aunt and other adults who had questioned M about the alleged assault. The State presented no physical or medical evidence corroborating that an assault had actually ever occurred. The Petitioner testified and denied that he had ever had any sexual contact with M. The State's case depended on M's credibility. M's credibility, in turn, depended on the State's ability to convince the jury that M's disclosure was not the product of suggestive questioning.

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[1] To preserve the privacy of the complainant in compliance with Connecticut General Statutes § 54-86a, this Petition will refer to the complainant only as "M" and will identify her mother and aunts by first name only.

The jury never heard evidence that M had also made accusations of sexual misconduct or abuse against three relatives: the ex-husband of the aunt who had first questioned M to elicit the "disclosure" of sexual assault in this case, to whom the aunt had still been married when she questioned M in 1994; the aunt's teen-aged nephew; and the aunt's adult cousin. Although the prosecutor was fully aware of these allegations and had disclosed them to the court and defense counsel, no evidence concerning these allegations was ever admitted. The prosecutor then argued, throughout his summation, that the jury could believe M's testimony because no one had any motive to "cover" for a family member.

The Petitioner's trial counsel attempted to impeach the credibility of the aunt who had elicited M's first "disclosure" by questioning her about members of her family, but the court sustained the prosecutor's objections to the questioning. The Petitioner's trial counsel subsequently failed to object to the prosecutor's argument that no one had any reason to "cover" for a family member.

On appeal to the Connecticut Appellate Court and later to the Connecticut Supreme Court, the Petitioner argued that (1) preclusion of his cross-examination of the aunt to challenge her credibility violated his right to confrontation and (2) the prosecutor's argument was so misleading, in view of the facts known to the prosecutor but not presented to the jury, that it constituted a denial of due process and rendered the results of the trial unreliable. While the Appellate Court and three Justices of the Supreme Court rejected these claims, two Justices of the Supreme Court agreed that the prosecutor's argument was so misleading, in view of the exclusion of the evidence of allegations of familial abuse, that a new trial was required.

The Petitioner now asks this Court to reverse his conviction on the ground that the prosecutor's argument so misled the jury as to deprive him of due process and to undermine confidence in the jury's verdict. The federal constitutional issue presented is a fundamental one: does the guarantee of due process in the Fifth and Fourteenth Amendments prohibit a prosecutor from misleading the jury on an issue critical to the State's case by emphasizing, in summation, the absence of evidence that the prosecutor knows to exist?

STATEMENT OF THE CASE

The Petitioner, Rick Provost, is an aircraft machinist in his forties who has never previously been accused of a crime. (Transcript at 1000-04, 1282 [hereinafter "T. at __."].) He dated M's mother Jeannette intermittently during 1990 and 1991. At that time, M was between 5 and 6 years old. She got along well with Provost and never showed any fear of him. (T. at 292, 296-97, 301-02, 349.) He sometimes took her with him to watch him play racquetball. (T. at 210-12, 1011-12.) Provost and Jeannette broke up late in 1991, and Provost did not see M after that time. (T. at 344-46.)

After her relationship with Rick Provost ended, M's mother Jeannette immediately began dating another man, who lived with her until the fall of 1993, when he died suddenly. (T. at 302-03.) Shortly after his death, when Jeannette began dating another man, M developed severe psychological problems and was extremely angry with her mother. (T. at 303-04, 353.)

Jeannette and her older sister Darline, who was like "a second mother" to M, took M to a psychiatric clinic in early February 1994. (T. at 376-77, 381-85.)

At the clinic, M became violently upset and exhibited a marked fear of men. (T. at 701-04.) She was hospitalized for three days for a psychiatric examination. A medical examination revealed that she had a yeast infection and blood in her urine. The infection prompted hospital staff to ask whether M was sexually active.[2] (T. at 95-96, 401-02.)

Jeannette and Darline discussed the yeast infection and its implications in M's presence on the way home. (T. at 308-10, 385-88.) Darline asked M to stay overnight at Darline's to talk about it. (T. at 386-87.) Darline bathed M and then questioned her specifically about possible sexual abuse for about half an hour, during which time M was crying and upset. (T. at 407.) After Darline asked if "anybody had touched her," M finally said that "he had hurt her." (T. at 388.) According to Darline's trial testimony late in 1995, Darline asked *who* had hurt her, and M said, "Rick, mom's boyfriend." (T. at 388.) However, Darline had originally told police that M said "Rick" hurt her, and that *Darline* knew who "Rick" was because her sister had dated Richard Provost. (Arrest Warrant Aff. ¶ 4.) Darline then told M's mother about the alleged abuse, and Darline reported it to the child protection authorities. (T. at 395-97.)

On the first day of testimony in Provost's trial, but before the first witness testified, the prosecutor disclosed to the court that M had recently accused two relatives of sexually abusing her. The prosecutor made the following representation out of the jury's presence:

> I wanted to indicate to the Court some disclosures I made to the defense

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[2] The jury learned only that M had a yeast infection; it never heard testimony that the hospital staff had asked whether M was sexually active at age 9.

> attorney over the last few days. The disclosures were that the victim in this matter has disclosed another sexual assault by the cousin. That allegedly occurred in the last couple of weeks. . . . Also I was informed that the – it's not the uncle, it's actually a second cousin, a guy named Rick or Ricky Reardon[3] had sexually abused the victim. . . . *[B]ased on conversations with the victim, I believe that the date was sometime in the end of 1993, beginning of 1994, which would have been around – just before the time of the disclosures in this incident.*

(T. at 102-03) (emphasis added). At the time, the prosecutor acknowledged that the alleged abuse by Rick Reardon could be relevant.[4] (T. at 103.)

---

[3] The Petitioner later testified that the Reardons were Jeannette's cousins. He and Jeannette had sometimes played cards at the Reardons' house on King Street, and he thought he might have seen Darline at the Reardons' house on holidays. (T. 1028, 1032-34.)

[4] Although the prosecutor indicated, on November 15, 1995, that his conversations with M led him to believe that the alleged abuse by Rick Reardon occurred late in 1993 or early in 1994, which would have been just before M purportedly told Darline that "Rick" hurt her, by November 17, 1995, the prosecutor represented that he had questioned M further (out of the presence of the court, the defendant, and the jury) about the alleged abuse by Rick Reardon and now believed that it had occurred in 1995. After Rick Provost was convicted and sentenced, Rick Reardon confessed, in May 1996, that he had sexually assaulted M about "9 months to one year earlier." (Reardon Arrest Warrant Aff.) Although Reardon claimed that he had never abused M again, his confession was silent about whether he had ever previously abused her. The State agreed that it was appropriate for the Connecticut Supreme Court to take judicial notice of Reardon's subsequent guilty plea and conviction.

M's own testimony was minimal. Largely in response to leading questions, she testified that when she was alone with Rick at his house, he had called her upstairs when he came out of the shower, then lay on top of her, pulled down her pants, and that she could feel his "private" in or on top of her "private." (T. at 215-17.) Asked if she could feel anything "wet" or "hot," she responded that she felt "wet" "on her stomach," and that the "wet" came from "Rick." (T. at 219.)

The day after M testified, the prosecutor disclosed that M's aunt Lisa (Darline's and Jeannette's sister) had given him a set of handwritten notes she had been keeping since M's 1994 "disclosure" to Darline. He provided exculpatory portions of those notes to the Petitioner's trial counsel that morning. (T. at 279-80.)

Lisa's notes indicated that Darline had been aware of at least one report of sexually inappropriate conduct in her own household. According to Lisa, M had told Darline that Darline's husband Romeo, or "Meo," had told M that he "wanted to lick between [M's] legs," and M was afraid of him.[5] (Def. Ex. C for

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[5] Lisa's notes describe her conversation with M as follows:

> did anything ever happen over Darlines, one time when I was going up to Bed, Uncle Meo told me to come here I want to lick between your legs. What did you do. I made believe I was asleep I was scared he would come in. did you tell Darline, yah she didn't believe me at first, she came in and laid down next to me and said why are you shaking you lying. Did Meo or David ever touch you, "No." how come you told Darline about Rick. Because she said she wasn't going to stop asking till I tell her.

ID; *see also* T. at 335.) Darline was still married to Romeo when she questioned M about sexual activity in 1994, but was divorced from him by the time of Provost's trial in 1995. (T. at 335, 408.)

Lisa's notes also indicated that in 1992, two years before M's "disclosure" to Darline, Lisa had seen M, then eight years old, wearing only a loose T-shirt and no underwear, in a room with Darline's teenaged son David. (Def. Ex. C for ID.) Lisa further recounted a conversation in which M told Lisa that she had first told Darline about "Rick" because Darline had asked her specifically about "Rick" and "because she said she wasn't going to stop asking till I tell her." (Def. Ex. C for ID.) Lisa also reported that M had told her that "some of the things Darline asked she said no to, Darline thought she said yes." (Def. Ex. C for ID.) When Lisa asked M to tell Lisa what she had told Darline about Rick, Lisa's notes indicate that M said only that "Rick used to take her over to the house, do things to her on the couch, go take a shower and get dressed, told her to watch TV. One time they were there and Jeannette was sick and he wouldn't let them [M and her brother] go see her and he slapped them in the face." (Def. Ex. C for ID.)

The prosecutor gave defendant's counsel Lisa's notes on the morning of the day that Darline testified. (T. at 279-80, 322.) The prosecutor had not mentioned any allegation about Darline's former husband Romeo when, the day before, he had disclosed M's two allegations about abuse by her teenaged cousin and her adult cousin. The day after Darline testified, the prosecutor acknowledged to the court, out of the jury's presence, that Romeo's "comment" about an "inappropriate activity" had recently been reported to the police. (T. at 517.)

(Def. Ex. C for ID.)

During Darline's testimony on direct examination, the prosecutor asked her *why* she had asked M who had hurt her. (T. at 390.) Darline responded: "If it was somebody in my family; if it was somebody in the household. I needed to know that to protect her. And more in the future. And I indicated that she needed to tell me who it was or I couldn't protect her." (T. at 390.)

When Provost's trial counsel attempted to cross-examine Darline about her concern about family members, the prosecutor objected and the jury was then excused. The court asked Provost's counsel on what ground he claimed the question. Counsel replied:

> MR. THOMPSON: Oh, my claim simply is: she was concerned about the members of her family who could have caused this particular yeast infection. She brought it up on direct. That means I certainly can probe her particular concern about her family. And Mr. Provost is certainly not her family.
>
> THE COURT: Did you want to input, Mr. Murphy?
>
> MR. MURPHY: Just briefly, your Honor. I believe the question was – I'm not sure what the question was, but what it was was: Why did you ask who it was? And her answer was: Because if it were someone in my family I wanted to know about it so I could protect her. And that was the response.
>
> THE COURT: That's pretty close to my notes, counsel.
>
> MR. MURPHY: All right. I still think – and I don't believe that that

opens the door for us to get into all the members of the family. I think we're still bound by the third-party culpability like the Court described.

THE COURT: Mr. Thompson, do you want to be heard on that?

MR. THOMPSON: Yes.

THE COURT: Are you claiming anything other than third-party culpability, so that I'm clear and the record is clear, counsel?

MR. THOMPSON: No, I'm claiming it for credibility with regard to what she can remember as to what she testified on direct.

THE COURT: That's fine. Counsel. I'm going to sustain the objection.

(T. at 412-13.)

The Petitioner's counsel did not make an offer of proof based on the information he had just received from the prosecutor that morning to demonstrate his good faith basis for inquiring into Darline's motive and bias both in her original questioning of M and in her trial testimony.

The only reference to possible familial abuse – other than Darline's own testimony on direct examination – occurred when Provost testified. When the prosecutor asked him, on cross-examination, whether M had ever behaved in a sexually inappropriate manner with him, he testified that M had once taken his hand and put it on her crotch. He removed his hand and told M that she shouldn't let people touch her private parts. He testified that when he told Jeannette about the incident, Jeannette said that she thought Darline's son David had sexually

molested M. (T. at 1055-56.) Jeannette took the stand in rebuttal and denied that she had ever told him that Darline's son had abused M. (T. at 1062.)

Although the prosecutor was aware that M had recently made numerous allegations of past familial abuse and had reported that Darline's ex-husband had once made sexual threats to her, his summation to the jury focused on the lack of evidence that anyone in M's family had any reason to steer M to accuse a non-family member of sexual abuse. He admitted that the "issue really comes down to the words of a child." (T. at 1164.) He acknowledged that the child's testimony contained inconsistencies. (T. at 1171-72.) He then repeatedly argued in the following vein:

> You say, well, maybe she's covering for someone, someone in her family or something like that. Well, if that's the case, ladies and gentlemen, *why did we even hear about this at all?* You know what I mean? On February 6, 1994 – put in your mind, suppose [M] said: Hey, somebody else did this. Someone in the family did this. What happens next? Do we get a call to the hot- -- to DCF hotline? No. What happens is you never hear about it again. *We would never be here if for some reason someone in the family had been identified as -- by [M], you know: So and so did this. You'd never have heard about this. Why bring this whole thing under scrutiny? So that's another reason why Darline didn't make this up and feed it to M.* [(T. at 1209) (emphasis added).]

> Never would have gotten reported. I mentioned that above. Wouldn't have put

> [M] through this if it was just to cover for someone. [(T. at 1211.)]
>
> Let me suggest a framework, *that I think is undisputed*, and from which point I'd like to jump off. . . .
>
> One is, first on February 6, 1994, *[M] disclosed to her Aunt Darline*, in the morning hours that she had basically had sexual contact with the defendant, mom's old boyfriend, Rick. [(T. at 1175) (emphasis added).]

The prosecutor focused the jury's attention on the absence of evidence that would allow an inference *either* that Darline put pressure on M *or* that M might have shaped her "disclosure" to fit what Darline wanted to hear. He repeatedly emphasized the absence of evidence that revealed any interest or motive on Darline's part to steer M's disclosure away from a family member:

> Are those something that [M] dreamed up *or is it something that someone else dreamed up for her* or did that happen? [(T. at 1165) (emphasis added).]
>
> Is this something that she's dreaming up? Is there some indication that she has made this up or that she's protecting somebody and this is all part of an elaborate scheme. [(T. at 1166.)]
>
> [T]here is no reason, *no reason in the evidence in this case*, why [M] would have made this up other than that the defendant had done this to her. No reason. [(T. at 1169) (emphasis added).]

Somehow mom or the aunt put the kid up to it. Well, there are two things that are important here. One is: *What gain do they have, mom and aunt,* to *bring out this guy from two and a half years before and doing this whole thing? No gain at all.* [(T. at 1173) (emphasis added).]

Was it clear to you – and I'm going to come back to this again – *that somehow [M] was trying to repeat what someone else told her.* Or was it something that was coming genuinely from her? [(T. at 1210) (emphasis added).]

[T]he main issue, again, what possible reason would [M] have on February 6th to say: Oh, this guy over here two and a half years ago did this to me – unless it were true? [(T. at 1211.)]

Now, you might say – and this is what I told you before – that Darline made it up and fed it to [M] You know, you might say: Kevin, why isn't there a reasonable doubt based on that? . . . Let me tell you why the evidence shows that those three things did not happen.

First, why would – dealing with Darline. Does the argument, the reason – did Darline make this up? The answer, no. Why? Why would – first of all, *the main thing in this whole thing.* I'm going to come back to this. Why would Darline make up something against a guy who hasn't been anywhere near this family for two and a half years? Why would she do

this? *What kind of bias, interest does she have against this defendant?*

I'm not saying back – I'm not going to get into an argument with you what happened back when there's this relationship going. But I'm saying, here we are two and a half years later, two boyfriends have gone, and in fact Darline, by the defendant's own admission, had very minimal contact with the defendant. What causes that to happen? *So I say that's one reason why that Darline didn't make this up.* [(T. at 1208-09)(emphasis added).]

What about Darline's reaction? Wasn't it an honest reaction? If a child identifies this ex-boyfriend, she calls the hotline. Again, that fits in with my prior argument. But again, *this all shows that Darline did not feed something to [M].* And if she did . . . [w]hy is this detail so limited as she described? Well, I asked her about it. *I found out who it was because I didn't want it to be someone in my family. I didn't – if it was someone in my family, I would have taken action, but I, you know, wanted to make sure that [M] wasn't in jeopardy.* And she – once she determined that, then she calls up the hotline. But you remember her details at that time were very limited. [(T. at 1209-10) (emphasis added).]

The prosecutor repeatedly argued that Darline would not have "put M through this" only to protect another family member:

> Would she have put [M] through this if she was covering for someone else? just to cover for someone else? Again, that's for you to determine. But I think that also indicates that *Darline didn't make this up.* [(T. at 1210) (emphasis added).]

The Petitioner's trial counsel did not object to the prosecutor's closing argument. The Petitioner asserted on appeal to the Connecticut Appellate Court that the preclusion of cross examination had deprived him of his constitutional right to confrontation, and that the prosecutor's misleading statements in the closing argument had deprived him of due process of law. The Appellate Court rejected Provost's claims. Addressing his claim of prosecutorial misconduct, the Appellate Court commented: "The problem with the defendant's claim is that excluded evidence does not exist at all, for purposes of closing arguments. It cannot be blatantly egregious, therefore, to address such an absence of evidence, notwithstanding the manner by which it was excluded." *State v. Provost*, 713 A.2d 879, 885 (Conn. App. Ct. 1998), *aff'd*, 741 A.2d 295 (Conn. 1999).

After granting certification to appeal, the Connecticut Supreme Court affirmed by a vote of three to two. The majority held that: 1) Provost failed to articulate his theory to the trial court on the relevance of the proposed cross-examination regarding Darline's family and failed to identify the material he possessed; and 2) the prosecutor's remarks did not infringe on Provost's right to a fair trial because Provost's trial counsel had not sought to introduce the evidence he possessed that would have impeached Darline's credibility. *See State v. Provost*, 741 A.2d 295, 301, 303 (Conn. 1999). The Court concluded: "Therefore, this was not an instance of the state attempting to capitalize on its successful efforts to exclude evidence

that might have been unfavorable to its case." *Id.* at 303. The plain implication of this latter ruling is that a factually misleading statement in closing is not a misrepresentation if the defendant failed to offer evidence to prove its falsity or if the trial court did not improperly exclude evidence proving the statement false.

The Petitioner raised his claim of prosecutorial misconduct in both the Connecticut Appellate Court and the Connecticut Supreme Court under the Connecticut rule articulated in *State v. Golding*, 567 A.2d 823 (Conn. 1989), which permits a defendant who fails to make a contemporaneous objection to a constitutional violation to prevail on appeal if:

> (1) the record is adequate to review the alleged claim of error; (2) the claim is one of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the State has failed to demonstrate harmlessness beyond a reasonable doubt.

State v. Golding, 567 A.2d 823, 827 (Conn. 1989).

In this case, the Connecticut Supreme Court agreed with the Connecticut Appellate Court that the record was adequate for review and that the claim was one of constitutional magnitude, but concluded that a constitutional violation did not clearly exist. *See Provost*, 741 A.2d at 303 (Conn. 1999); *Provost*, 713 A.2d at 885. Therefore, to the extent that the Connecticut Supreme Court decision is based on a state procedural ground, that ground is dependent

upon the federal constitutional question presented and is therefore reviewable by this Court. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

REASONS FOR GRANTING THE WRIT

State and federal courts of appeal have ruled that criminal convictions must be reversed when a prosecutor's closing argument misleads the jury on an essential issue in a case. Examples of misleading arguments include those that emphasize the absence of evidence that was excluded or not disclosed to the defendant but was known by the prosecution to exist. Such arguments fundamentally mislead the jury, undermine confidence in the verdict, and violate the guarantee that no person will be deprived of liberty without due process of law. This case affords this Court an opportunity to address an important federal constitutional principle that was misapplied by the Connecticut Supreme Court.

I. The Connecticut Supreme Court's Decision Conflicts With Decisions Of Federal And State Courts On An Important Federal Question That Has Not Been Settled, But Should Be Settled, By This Court.

Federal and state courts have recognized that a prosecutor's summation may constitute misconduct and require reversal if it misleads the jury by emphasizing the absence of evidence that the prosecutor knows to exist. For instance, in *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993), the defendant was convicted of drug offenses in connection with serving as a courier of heroin from Aruba. At trial, the defendant admitted that she had been carrying drugs when arrested, but claimed that a man named Michael Mouhma in Arruba had threatened the safety of her children if she did not

carry the drugs for him. The prosecution was aware that a Michael Mouma existed and was known as a targeted drug trafficker. The prosecution did not disclose the full scope of its information about Mouma to the defendant, although some information was revealed. The prosecutor, in closing argument, then argued that there was no evidence supporting the defendant's claim of coercion. The First Circuit held:

> Whether the government's failure to disclose this credibility-strengthening information could be said to be reversible error, we need not decide. We have no doubt, however, that the prosecutor's persistent theme in closing argument suggesting the nonexistence of this information – and even the opposite of what the government knew – did fatally taint the trial.
>
> . . . .
>
> . . . The inferences and the direct challenge to the existence of a source named Michael . . . when the prosecution had unearthed evidence that he existed and was a prominent dealer in narcotics, is indefensible. . . . [I]t is plainly improper for a prosecutor to imply reliance on knowledge or evidence not available to the jury. It is all the more improper to imply reliance on a fact that the prosecutor knows to be untrue, or to question the existence of someone who is known by the prosecution to exist.

Id. at 1105–06 (internal quotation marks and citations omitted).

While *Udechukwu* involved a "double-acting prosecutorial error" in that it involved both a

prosecutor's failure to disclose exculpatory information as required under *Brady v. Maryland*, 373 United States 83 (1963), *and* a "deliberate insinuation that the truth is to the contrary," the Court's decision rested primarily on the effect of the prosecutorial misconduct on the fairness of the defendant's trial. *Udechukwu*, 11 F.3d at 1106. Other courts have found misleading prosecutorial arguments to warrant reversal even in the absence of a potential *Brady* violation.

For instance, in *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994), the prosecutor capitalized on his success in excluding evidence that another person had confessed to the murder at issue by arguing that the defendant's testimony concerning the other person's confession was a recent fabrication. In fact, the prosecutor well knew that in fact the other person had confessed but had also exercised her Fifth Amendment right not to testify. As the Court noted, "the prosecution was entirely within its rights to challenge the admissibility of Underwood's confession. However, the prosecutor exceeded the bounds of propriety when it sought to convey to the jury inconsistent false information." *Id.* at 1549 n.16.

The Court in *Davis* properly applied a four-part test to determine whether the prosecutor's improper remarks, considered in the context of the whole trial, rendered the trial unfair. The relevant criteria included: "(1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused." *Id.* at 1549. Applying those criteria, the *Davis* Court concluded that the argument was highly misleading and prejudicial, extensive, and

deliberate, and because the state's case contained uncertainties and substantial conflict in the relevant evidence, the argument rendered the trial fundamentally unfair. *See id.* at 1551.

It is well settled among the circuits that misleading statements by prosecutors in closing argument are improper, no matter what the cause. In *United States v. Forlorma*, 94 F.3d 91, 92-94 (2d Cir. 1996), the defendant was accused of bringing heroin into the United States in a suitcase. The defendant claimed that he had not known that the drugs were in the suitcase. He admitted, however, that he had bought a new suit while in Korea. The prosecutor argued repeatedly that the jury could infer the defendant's knowledge of the heroin because a new suit that fit the defendant was in the same suitcase as the heroin. In fact, however – although the prosecutor may have been unaware of it during trial – the four bags that the defendant had been carrying when he was arrested had been opened and their contents had been intermingled during the search. Some of the clothes fit him; some did not. There was therefore nothing in the evidence that supported the prosecutor's claim that a new suit that fit the defendant was in the suitcase containing the heroin at the time the defendant was first stopped. The Court ruled that a new trial was required because it could have no confidence that the verdict would have been the same in the absence of the misstatements. Noting that the prosecutor may have been unaware of the intermingling when he made his argument, the Court commented:

> [T]he prejudicial effect on the jury of a misleading argument is equally great regardless whether the attorney knows it to be baseless. The prosecutor's inaccurate assertion was uttered not

> once but three times, and with great emphasis. This was not an instance of a trivial misstatement that was likely to pass unnoticed.

Id. at 95. *See also United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1997) (in a case where defendant was charged with conspiring to have leased car stolen because it had become troublesome and expensive, prosecutor's erroneous statement in closing argument that it would have cost defendant "a fortune" to cancel lease and return car before lease expired was reversible error); *United States v. Kojayan*, 8 F.3d 1315, 1317, 1324 (9th Cir. 1993) (prosecutor's argument that missing witness could not be compelled to talk, when in fact government had cooperation agreement with witness, deprived the defendant of due process).

State courts that that have addressed the issue of arguments that urge the jury to draw an inference from the absence of evidence known to exist have uniformly held that arguing such an inference is error, regardless of how or why the evidence was not produced. *See Commonwealth v. Mosby*, 413 N.E.2d 754, 759-60 (Mass. App. Ct. 1980) (improper for prosecutor to call jury's attention to absence of evidence when absence results from prosecutor's objection); *State v. McNeely*, 664 P.2d 277, 281(Idaho Ct. App. 1983) (proper to preclude defense counsel from inviting jury to infer that suppressed evidence did not exist); *People v. De Goenaga*, 168 N.W. 436, 437 (Mich. 1918) (improper and prejudicial for prosecutor in closing argument to dwell on failure to produce a witness whose testimony had been excluded); *State v. Taylor*, 929 S.W.2d 925, 928 (Mo. Ct. App. 1996) (defendant prejudiced by exclusion of evidence and subsequent ability of state to argue inferences from the absence of that evidence); *State v. Price*, 541

S.W.2d 777, 778-79 (Mo. Ct. App. 1976) (improper for prosecutor to comment on the failure of excluded witness to testify); *Commonwealth v. Wall*, 606 A.2d 449, 464 (Pa. Super. Ct. 1992) (to the extent prosecutor sought to draw adverse inference from the absence of evidence of other sexual assault that he had successfully excluded, such argument was reversible error). *See also* Jacob A. Stein, *Closing Argument: The Art and the Law* § 16 (1994), and cases cited therein.

The fundamental principle underlying the cases cited above is that it is improper for any counsel – prosecutor or defense – to mislead the jury by arguing that the absence of evidence known to exist proves anything. A criminal conviction cannot stand when a prosecutor has intentionally (or even unintentionally, as in *United States v. Forlorma*, 94 F.3d 91 [2d Cir. 1996]) made arguments that mislead the jury as to a critical issue of fact in a case. As with convictions obtained by use of false evidence, the essential problem is that the jury's verdict is unreliable when it is influenced by arguments or testimony that lack factual support. *See, e.g., Miller v. Pate*, 386 U.S. 1, 7 (1967) (Fourteenth Amendment cannot tolerate conviction obtained by knowing use of false evidence); *see also Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).

II. The Prosecutor's Misleading Statements Deprived The Defendant Of A Fair Trial.

To constitute a due process violation, prosecutorial misconduct must be " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " *United States v. Bagley*, 473 U.S. 667, 676 (1985) (*quoting United States v. Agurs*, 427 U.S. 97, 108 (1976)). The relevant question is whether

the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The circumstances of *this* case, as the dissenting Justices in the Supreme Court agreed, reveal that the Peitioner's trial was so infected.

The reliability of M's accusation was the central question in this case. The State had no physical evidence that any abuse had occurred. M had not reported any abuse while the Petitioner was dating her mother, nor had she ever seemed afraid of him. (T. at 349-50.) M's behavior problems began late in 1993, when her mother began to date after another boyfriend's death. (T. at 303-04, 353.) M *never* spontaneously accused the Petitioner, but did so only after Darline questioned her specifically about possible sexual abuse.

Darline's testimony was admitted as "constancy of accusation" evidence.[6] Because M's own testimony on direct was both sparse and acquiescent to the prosecutor's leading questions, several of the details that the prosecutor emphasized in his closing came from the testimony of the constancy witnesses, not from M's own testimony. The *sole* purpose of constancy of accusation testimony is to enhance the credibility of the complainant. *State v. Troupe*, 677 A.2d 917 (Conn. 1996). Darline's credibility as the primary constancy witness was therefore directly

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[6] Under Connecticut law at the time of this trial, a "constancy of accusation" witness could testify to details reported by a complainant in a sexual assault case. After the Petitioner's trial, the Connecticut Supreme Court limited the type of testimony admissible as constancy evidence in *State v. Troupe*, 677 A.2d 917 (Conn. 1996). Under *Troupe*, the State can now offer constancy witnesses only to corroborate that the complainant has previously told others of the alleged assault. The new rule announced in *Troupe* applies only prospectively. *See id.* at 928-29.

relevant to M's credibility and was plainly a central issue in this case.

Every *recorded* interview of M consisted of leading and suggestive questions. The prosecutor conducted almost all of his direct trial examination through leading questions.[7] The police interview of M, used to develop the information in the arrest warrant affidavit, similarly consisted of leading questions to which M acquiesced. Indeed, after viewing a videotape of that interview, the trial court ruled that the officer who conducted it could not testify as a constancy witness because the videotape demonstrated its "complete lack of trustworthiness." (T. at 495-96.)

Pam Neary, a social worker who interviewed M a day or two after her first "disclosure" to Darline, conducted her interview of M under highly suggestive circumstances: when Darline and Jeannette took M to discuss the alleged abuse with Neary, *Darline* first reported the allegations to Neary in M's presence, and Neary then made sure that M understood that she was there to talk about *what she had told her aunt Darline.* (T. at 709.) After Darline had set the stage for Neary's interview in M's presence, Neary then interviewed M alone, but her very first questions assumed that Darline had accurately reported M's "disclosure" and that M had in fact been abused by her "mom's old boyfriend,"[8] whom *Darline* identified as "Rick." (T. at

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[7] The court commented, out of the jury's presence, that "the Court has seen . . . the difficulty of the state in attempting to elicit from the alleged victim that which allegedly occurred." (T. at 495.)

[8] Neary's first questions to M were as follows: "You said your mom's old boyfriend did some things." When M did not respond, Neary asked, "How long did you know him?" When M did not answer, Neary introduced drawings of a nude adult male and a nude female child to elicit information. (T. at 715-16, 768-70.)

770.) M "agreed with her aunt" and identified her "mom's old boyfriend." (T. at 715.) Yet Neary, who testified both as a constancy of accusation witness to bolster M's credibility and as an expert witness about reasons children may delay in reporting sexual abuse, admitted in her expert capacity that it is critical *not* to ask children suggestive questions in cases of suspected sexual abuse, because suggestive questioning can "contaminate" the disclosure. (T. at 711, 764.)[9]

There is no videotape or written record of *Darline*'s questioning of M. There is only M's

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[9] Courts have recognized that suggestive questioning may so taint a child's report of sexual abuse as to make it wholly unreliable. *See, e.g., State v. Michaels*, 625 A.2d 489, 511 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994). The *Michaels* court, noting the vast body of recent research on children's susceptibility to suggestions of sexual abuse, observed that despite differences in conclusions about children's susceptibility, researchers have voiced "consistent concern about the interview process and the possibility of distorting recollections by suggestive or leading questions." *Id.* at 511. As the *Michaels* Court observed,

> Careful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable. A number of studies have shown that children will lie when they have a motivation to lie, *that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe, and that inappropriate post-event questioning can actually change a child's cognitive memory of the event.* Even the studies that concluded that children are resistant to suggestion found a small percentage of children who are not.

Id. at 514 (emphasis added) (quoting Diana Younts, *Evaluating and Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691 (1991).

testimony and Darline's testimony. M testified she told Darline about the alleged abuse because Darline asked if anything had ever happened to her "in the *past.*" (T. at 222.) Darline testified on direct examination that she questioned M because the yeast infection made Darline concerned – presumably about *recent* sexual contact – and she needed to know if it was "somebody in my family." Given M's passivity at trial, Darline's critical role in extracting from M the first accusation against Rick Provost, and Neary's testimony that suggestive questioning could "contaminate" a disclosure, the prosecutor *had* to convince the jury that Darline had no ulterior motive in pressing M to say that someone had "touched her" or to identify an abuser "in the past" rather than in the present. To that end, the prosecutor objected to every effort by the defense counsel to impeach Darline by cross-examination intended to elicit information about family members whom Darline might have *feared* were abusing M. He then argued, repeatedly and vigorously, that the jury could believe M's allegation because there was no evidence that Darline had any reason to "feed" the accusation to M or to "cover" for a family member.

The majority of the Supreme Court held that the Petitioner's trial counsel failed to make an offer of proof that was necessary to establish the relevance of the evidence concerning Darline's family members. The majority then extrapolated from that holding to conclude that because the Petitioner's trial counsel did not seek to introduce the evidence of other alleged familial abuse, "this was not an instance of the state attempting to capitalize on its successful efforts to exclude evidence that might have been unfavorable to its case." *State v. Provost*, 741 A.2d 295, 303 (Conn. 1999).

Justice McDonald, joined by Justice Berdon, disagreed. Justices McDonald and Berdon concluded that the "combined effect of the evidentiary ruling and the closing arguments of the state's attorney 'so compromised the integrity of the trial as to call into question the reliability of the verdict.' " *Provost*, 741 A.2d at 306 (McDonald & Berdon, J.J., dissenting) (*quoting State v. Watson*, 740 A.2d 832, 841 (1999).

The dissenting Justices correctly recognized that the unreliability of the verdict is touchstone of the Petitioner's due process claim. The failures of Petitioner's trial counsel do not change the facts known to the prosecutor, but not to the jury, when the prosecutor argued that there was "no reason in the evidence in this case" to believe that Darline had any reason to "feed something" to M to "cover" for someone. The prosecutor knew, even as he spoke, that allegations of sexual threats by Darline's ex-husband and sexual assault by Darline's teen-aged nephew and her adult cousin Rick Reardon had been reported to the police and were under investigation. The prosecutor knew that Darline's sister Lisa suspected sexual misconduct in Darline's household. The very fact that Darline's sister had harbored such suspicions and that Darline's family was under such scrutiny would necessarily have affected the jury's perception of Darline's motives in questioning M and her bias in testifying at the Petitioner's trial.

Given the weaknesses in the State's case – M's submissive, vague, and inconsistent testimony, the absence of physical evidence that sexual assault had occurred, the long delay in "disclosing" the alleged abuse, and the circumstances under which the "disclosure" occurred – evidence that impeached Darline's credibility would have seriously damaged the State's case. Because the prosecutor's misleading argument went to the core of the State's case, it is

highly probable that it affected the outcome of the trial. This Court should grant certiorari to review the majority decision by the Connecticut Supreme Court and to establish, as a matter of federal constitutional law, that a prosecutor may not mislead a jury by arguing that the absence of evidence he knows to exist proves a criminal defendant's guilt.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Sheila A. Huddleston
(*Counsel of Record*)
James W. Bergenn
Morgan P. Rueckert
Shipman & Goodwin LLP
One American Row
Hartford, Connecticut 06103
(860) 251-5000
Counsel for the Petitione

No. _____

In The
Supreme Court Of The United States

RICHARD E. PROVOST,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CONNECTICUT

STATE OF CONNECTICUT v. RICHARD E. PROVOST

Case No. SC 16012

Borden, Berdon, Katz, Palmer and McDonald, Js.*

Argued June 3 – officially released November 30, 1999

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford-New Britain and Hartford and tried to the jury before *Schimelman, J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Spear, Dupont* and *Daly, Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Sheila A. Huddleston, with whom were *James W. Bergenn* and, on the brief, *Morgan P. Rueckert*, Hartford, for the appellant (defendant).

Judith Rossi, senior assistant state's attorney, with whom, on the brief, were *James E. Thomas*, state's attorney, and *Kevin Murphy*, assistant state's attorney, for the appellee (state).

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* The listing of justices reflects their seniority status on this court as of the date of argument.

Opinion

KATZ, J. The defendant, Richard Provost, appealed to the Appellate Court from the judgment of conviction, rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes (Rev. to 1989) § 53a-70 (a), as amended by No. 89-359 of the 1989 Public Acts, and risk of injury to a child in violation of General Statutes (Rev. to 1989) § 53-21.[1] The Appellate Court affirmed the judgment of conviction, rejecting the defendant's "claims that the trial court had improperly: (1) precluded the cross-examination of a prosecution witness regarding her credibility in violation of the defendant's fundamental right to confront witnesses pursuant to both the sixth amendment to the United States constitution and article first, § 8, of the constitution of Connecticut; and (2) permitted the prosecution to engage in misconduct during closing argument in violation of the defendant's due process right to a fair trial." *State v. Provost*, 49 Conn. App. 56, 57, 713 A.2d 879 (1998). Thereafter, the defendant successfully sought

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[1] General Statutes (Rev. to 1989) § 53a-70 (a), as amended by No. 89-359 of the 1989 Public Acts, provides in relevant part: "A person is guilty of sexual assault in the first degree when such person ... (2) engages in sexual intercourse with a person under thirteen years of age."

General Statutes (Rev. to 1989) § 53-21 provides: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned more than ten years or both."

Because the defendant's criminal conduct occurred between April, 1990, and November, 1991, the statutes in effect at that time are those quoted herein. We note that while subsequent amendments, some substantive, have been made to these statutes, they are not relevant to this appeal.

certification to appeal on the following issues: (1) "Did the trial court improperly preclude the cross-examination of a prosecution witness?"; and (2) "Was the state's attorney's closing argument improper and is it reviewable under *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989)?" *State v. Provost*, 247 Conn. 914, 722 A.2d 808 (1998). We conclude that the Appellate Court properly rejected the defendant's claims. Accordingly, we affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts. "During 1990 through 1991, the victim, M, a minor female, lived with her mother, J.[2] In the winter of 1990, shortly before M's sixth birthday, J began dating the defendant, who was known to M as Rick. J often allowed the defendant to take M with him while he did errands, played racquetball, rode his motorcycle, and, on several occasions, the defendant was alone with M at his residence. J ended her relationship with the defendant in November, 1991.

"In January, 1994, M began exhibiting suicidal tendencies and a violent temper, often running away from home. J took M to the Wheeler Clinic in Plainville for a psychiatric evaluation. During the visit, M became severely agitated, had to be restrained, and was subsequently admitted to Mount Sinai Hospital in Hartford. Upon M's discharge from the hospital three days later, J and her sister, Darline, were informed by the hospital staff that M had a yeast infection and blood in her urine.

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[2] In order to maintain the confidentiality of the victim and her mother, they are referred to herein by their first initials only, while others are identified only by their first names.

"Following her discharge from the hospital, M spent a night at Darline's home. After bathing M, Darline, concerned about M's infection, began to talk with M about 'good touch and bad touch' in an effort to learn whether anyone had touched M inappropriately. M told Darline that 'Rick, mom's boyfriend,' had hurt her inside, kissed her on the mouth, and '[gone] to the bathroom' on her.[3] Darline immediately informed J about M's disclosures, and then reported the allegations to the department of children and families on February 6, 1994.

"After a police investigation, the defendant was arrested and subsequently found guilty of sexual assault in the first degree and risk of injury to a child." *State v. Provost*, *supra*, 49 Conn. App. at 57-58, 713 A.2d 879. Additional facts will be set forth as necessary.

I

At trial, the defendant attempted unsuccessfully to question Darline about members of her household. He claims that, by precluding the cross-examination of Darline with respect to her concern about whether any member of her family might have perpetrated the sexual abuse, the trial court violated his right to confront his accusers.[4] According to the defendant,

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[3] Neither Darline nor J had had any significant contact with the defendant since J had ended her relationship with him in November, 1991, nearly two and one-half years earlier.

[4] The defendant raises his confrontation claim under the sixth and fourteenth amendments to the United States constitution and under article first, § 8, of the state constitution. Because he provides no argument that his right under the state constitution is distinct from his federal constitutional right, for purposes of this case we treat the rights as coextensive.

Darline had a possible motive to conceal the fact that a member of her family could have been the true assailant. For support, the defendant avers to the following facts: (1) shortly before his trial, M had accused her second cousin Richard of having sexually assaulted her; and (2) a "diary" consisting of notes compiled by Lisa, Darline's sister, indicated Lisa's belief that Darline's husband or son may have been sexually inappropriate with M.

"Our analysis of the defendant's claim begins with the axiom that the defendant is entitled to confront and cross-examine fairly and fully the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . . In order to comport with the constitutional standards embodied in the confrontation clause, the trial court must allow a defendant to expose to the jury facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Citations omitted; internal quotation marks omitted.) *State v. Pratt*, 235 Conn. 595, 603-604, 669 A.2d 562 (1995). "In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State v. Santiago*, 224 Conn. 325, 331, 618 A.2d 32 (1992). "Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule

that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest. . . ." (Citations omitted.) *State v. Colton*, 227 Conn. 231, 249, 630 A.2d 577 (1993), on appeal after remand, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S.Ct. 972, 133 L.Ed.2d 892 (1996). "This right is not absolute . . . but may bow to other legitimate interests in the criminal trial process. . . . Such an interest is the trial court's right, indeed, duty, to exclude irrelevant evidence. . . . The confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination." (Citations omitted; internal quotation marks omitted.) *State v. Pratt*, *supra*, 235 Conn. at 604-605, 669 A.2d 562.

"The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." *State v. Barnes*, 232 Conn. 740, 746-747, 657 A.2d 611 (1995). Furthermore, "[t]o establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial." (Internal quotation marks omitted.) *State v. Castro*, 196 Conn. 421, 426, 493 A.2d 223 (1985). Finally, "[t]he proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence ... is irrelevant." (Internal quotation marks omitted.) *State v. Barnes*, *supra*, at 747, 657 A.2d 611. With these principles in mind, we now turn to the defendant's claims.

During the cross-examination of Darline pertinent to this claim, the following colloquy occurred: "[Defense Counsel]: And you asked her if somebody had sexually molested her?

"[Darline]: I didn't ask her that directly, no.

"[Defense Counsel]: Well, you said you wanted to know whether it was somebody in your family. That's what you told us on direct.

"[Assistant State's Attorney]: I object. That was not--

"[Darline]: That's not exactly--

"The Court: Excuse me. I think, again, the witness can indicate--

"[Assistant State's Attorney]: All right.

"The Court:--if she disagrees. And I think the witness is indicating that you disagree. Is that right, [Darline]?"

"[Darline]: Yes.

"The Court: Okay.

"[Defense Counsel]: So if I wrote down 'if it was somebody in the family' that you testified to, then I'd be wrong.

"[Darline]: I did not testify that it was somebody in the family. I testified that I was afraid who it might be. And if it was somebody in the family, I wanted to know to protect [M].

* * *

"[Defense Counsel]: So when you asked as to whether or not it was somebody in your family or somebody within the family, you did that because you thought it was relatively recent based upon the yeast infection, did you not?

"[Darline]: I never asked her if it was somebody in the family. I never tried to direct her in one way or the other: friend, relative, whatnot. I asked her who it was that touched her.

"[Defense Counsel]: So, once again, you're telling us that it was not somebody within your family that you were concerned about. And you didn't say that on direct examination.

"[Darline]: That's not what I said. I did not say that to [M]. I never mentioned family members, friends, relatives to [M] when I was talking to her. . . .

"[Defense Counsel]: And would you constantly ask [M] who had given her or how had this yeast infection occurred?

"[Darline]: No, I never asked her about the yeast infection being from somebody giving it to her.

* * *

"[Defense Counsel]: At the time, in 1994, when you were asking [M] what had happened, in the bathtub and shortly thereafter, who were the members of your family who lived under the same roof?"

The state objected to the last question on the grounds of relevance, and the court sustained the objection. Thereafter, the defendant attempted to ask Darline to whom she was married in 1994, when she first spoke with M about the assault, whether she lived alone at that time and whether she had a son. The

trial court sustained the state's objections to all three questions on the grounds of relevance.

The following colloquy between the court and defense counsel then transpired: "The Court: But I want to know what your claim is.

"[Defense Counsel]: Oh, my claim simply is [that Darline] was concerned about the members of her family who could have caused this particular yeast infection. She brought it up on direct. That means I certainly can probe her particular concern about her family. And [the defendant] is certainly not her family. . . .

"The Court: Are you claiming anything other than third party culpability, so that I'm clear and the record is clear, counsel?

"[Defense Counsel]: *No, I'm claiming it for credibility with regard to what [Darline] can remember as to what she testified [to] on direct.*" (Emphasis added).

After the trial court sustained the state's objection, it invited the defendant to articulate other reasons he would like the court to consider for questioning Darline about her family life. The defendant never availed himself of this opportunity.

On appeal, the defendant claims that the proposed line of inquiry was intended to expose Darline's alleged bias and motive to lie. The colloquy quoted above, however, belies that portrayal. Despite his current attempts to recharacterize the proffer, the defendant's express declaration of intent was limited to challenging Darline's credibility regarding what she

had testified to on direct examination.[5] Therefore, the issue of bias and motive was never identified as a basis for the inquiry.

Additionally, the defendant points to evidence, disclosed to the defendant by the state, that shortly before his trial, M had accused her second cousin Richard of having sexually assaulted her in 1995, and to the existence of a "diary" consisting of notes compiled by Lisa, Darline's sister, which indicated Lisa's belief that Darline's husband or son may have been sexually inappropriate with M, as evidence of Darline's motive to conceal the fact that a member of her family could have been the true assailant. Once again, however, despite his access to the disclosed material and to the information he gathered during his interview of Lisa, the defendant did not proffer or rely on the information to inform the court of the relevancy of his proposed line of inquiry. Indeed, at the time of its ruling, the trial court was aware only of Darline's close relationship to M and of her role in reporting M's allegations to the authorities. This information was not a sufficient basis upon which the trial court should have, sua sponte, speculated that Darline had been motivated improperly.

The defendant characterizes his claim in constitutional terms. Specifically, he claims that the trial court violated his rights secured under the confrontation clause. "The confrontation clause does

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[5] Although it was not the issue raised on appeal, the Appellate Court considered whether the defendant had provided the requisite evidentiary foundation that would have allowed the questioning of Darline to evolve into an issue of third party culpability, concluding that the trial court had properly exercised its discretion in precluding the defendant from questioning Darline about other family members. *State v. Provost*, supra, 49 Conn. App. at 61-62, 713 A.2d 879.

not, however, suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . Thus, [f]rom early times, it has consistently been held that it rests within the judicial discretion of the trial court whether to admit the impeaching statement where no foundation has been laid. . . . The trial court is vested with a liberal discretion as to how the inquiry should be conducted in any given case. . . . Moreover, it is well settled that questions of relevance are committed to the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *State v. Gould*, 241 Conn. 1, 16, 695 A.2d 1022 (1997). Regardless of whether there existed a good faith basis for questioning Darline about familial abuse, because the defendant failed to articulate his theory [251 Conn. 262] that Darline had steered M away from implicating a member of Darline's family and coached her to instead incriminate the defendant, and because he failed to identify the material he possessed, either about M's cousin Richard or about Lisa's notes, the court had no basis upon which to speculate about Darline's motive to influence M. We decline to impute to the trial court knowledge it did not have. Accordingly, we conclude that the trial court properly exercised its discretion in precluding the subject area of inquiry.

II

The defendant next claims that, because the trial court had disallowed the questions about Darline's son and former husband, and because the state knew of the alleged incident involving M's cousin Richard and the contents of Lisa's notes, portions of the state's closing argument--to which the defendant

did not object[6]--urging the jury to reject any notion that Darline or J had had any motive to coach M to make a false allegation against the defendant or that they had improperly influenced M, were so egregious as to deprive him of due process and a fair trial.[7] We begin our analysis of this issue by setting forth the basic principles of law pertinent to claims of prosecutorial misconduct.

"We have previously acknowledged that prosecutorial misconduct can occur in the course of closing argument." *State v. Atkinson*, 235 Conn. 748, 768-769, 670 A.2d 276 (1996). "It is well settled, however, that a defendant may not prevail under *Golding* . . . unless the prosecutorial impropriety was

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[6] The defendant seeks to prevail on this claim pursuant to *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any of these conditions, the defendant's claim will fail." (Emphasis in original.) *Id.*, at 239-40, 567 A.2d 823. Before the Appellate Court, the defendant sought to prevail on this claim under the plain error doctrine pursuant to Practice Book § 60-5. *State v. Provost, supra*, 49 Conn. App. at 62-63, 713 A.2d 879. The Appellate Court determined that the case did not qualify for plain error review. *Id.*, at 63 and n. 10, 713 A.2d 879. The defendant does not renew his claim under that doctrine in this appeal.

[7] The defendant cites to his right to due process of law under the fifth and fourteenth amendments to the federal constitution, and article first, § 8, of the Connecticut constitution. Because the defendant does not provide a separate analysis under the state constitution, for purposes of this case we treat the rights as providing coextensive protection.

so pervasive or egregious as to constitute an infringement of the defendant's right to a fair trial, nor will we invoke our supervisory authority to reverse an otherwise lawful criminal conviction absent a showing that the conduct of the prosecutor was so offensive to the judicial process that a new trial is necessary to deter such misconduct in the future.... Finally, we must review the challenged comments in the context of the entire trial, with due regard to the extent to which the objectionable remarks were invited by defense conduct or argument. *State v. Williams*, 231 Conn. 235, 246-247, 645 A.2d 999 (1994); *State v. Richardson*, 214 Conn. 752, 759-760, 574 A.2d 182 (1990)." *State v. Satchwell*, 244 Conn. 547, 564-565, 710 A.2d 1348 (1998).

Against this legal backdrop, we examine the defendant's claim that the state unfairly argued to the jury that there was no evidence that anyone improperly had motivated M to identify the defendant as her assailant in order to protect a family member from being identified. The defendant argues, in essence, that it was a form of misrepresentation, and therefore improper, for the state to ask the jury to draw an inference from the defendant's failure to introduce evidence that the trial court had ruled inadmissible.[8] *See State v. Ubaldi*, 190 Conn. 559, 567 n. 6, 462 A.2d 1001, *cert. denied*, 464 U.S. 916, 104 S.Ct. 280, 78 L.Ed.2d 259 (1983) (improper to argue that jury should draw negative inference from defendant's failure to call witness that trial court had

[8] We recognize that when evidence is excluded improperly, the harm to the defendant is compounded when the state takes advantage of the trial court's exclusion by urging the jury to draw an adverse inference based on the absence of the excluded evidence. *State v. Carter*, 228 Conn. 412, 428-429, 636 A.2d 821 (1994). Because we have concluded, however, that there was no evidentiary impropriety in the present case, we are not faced with the "compounding" problem.

precluded from testifying); *see also State v. McNeely*, 104 Idaho 849, 852, 664 P.2d 277 (1983) (proper to preclude defense counsel from inviting jury to infer that suppressed evidence did not exist); *Commonwealth v. Mosby*, 11 Mass. App. 1, 8, 413 N.E.2d 754 (1980) (particularly improper for prosecutor to call jury's attention to absence of evidence when absence results from prosecutor's objection to attempted introduction of evidence by defendant); *People v. De Goenaga*, 202 Mich. 503, 506, 168 N.W. 436 (1918) (improper and prejudicial for prosecutor in closing argument to dwell on failure to produce witness whose testimony had been excluded); *State v. Taylor*, 929 S.W.2d 925, 928 (Mo.App.1996) (defendant prejudiced by exclusion of evidence and subsequent ability of state to argue inferences from absence of that evidence); *Commonwealth v. Wall*, 413 Pa. Super. 599, 625-627 n. 21, 606 A.2d 449 (1992) (to extent prosecutor sought to draw adverse inference from absence of evidence of other sexual assault he had successfully excluded, such argument was reversible error); *see also* J. Stein, Closing Argument: The Art and the Law (1994) § 16 and cases cited therein. On the basis of the evidence and the defendant's closing argument, we conclude that the state was not prohibited from asking the jury to draw an inference from the lack of evidence regarding any improper motivation behind M's identification of the defendant.

The defendant complains that the state improperly urged the jury to draw an inference from the absence of excluded evidence. This was not, however, a case in which the defendant had been precluded from introducing certain evidence the absence of which the state thereafter highlighted for the jury. The defendant attempted to ask Darline if she had a son and the name of the person to whom she had been married. At the time of these questions,

however, the jury had already heard, through cross-examination of J, the name of Darline's husband at the time of the alleged assault and that she was divorced at the time of trial. Additionally, the jury knew that Darline had a son who was eleven or twelve at the time of the events in this case. The defendant did not seek to introduce evidence of the alleged 1995 assault of M by her cousin Richard or to question Lisa about her diary. Not only did he fail to rely on that information to inform the court of the relevancy of the aforementioned proposed line of inquiry; see part I of this opinion; but the defendant also failed to proffer such material to demonstrate other suspected abuse. Therefore, this was not an instance of the state attempting to capitalize on its successful efforts to exclude evidence that might have been unfavorable to its case.[9]

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[9] Additionally, the state contends that its argument merely responded to the defense theory that M's accusation of the defendant had been suggested to her. Specifically, it argues that the defendant made several attempts to create the impression that M's assailant was someone other than the defendant. In his testimony, the defendant related that J had told him that she believed that Darline's son had had intercourse with M when she was four years old and that J and Darline had done nothing about it. According to the state, this testimony became the basis for the defendant's suggestion that Darline's son might have been responsible for the act in question. The defendant also tried to establish that Pam Neary, M's therapist, subtly had suggested to M that her assailant was an adult rather than a boy closer in age, and that it was Neary who had "suggested that it was [the defendant] and she answered her own questions, rhetorical questions," rather than ask M to identify other people with whom she lived or people who bathed her, etc. Finally, according to the state, in his closing argument, defense counsel intimated that M would do whatever she believed Darline wanted her to do and that the entire case against the defendant was concocted. Therefore, although he sometimes suggested that the case involved well intentioned adults who jumped to conclusions and inadvertently supplied sexually suggestive details in their efforts to help M, the defendant also intimated that members of M's family had reasons

In light of the foregoing, we cannot agree with the defendant that the state's remarks improperly infringed on his right to a fair trial. Accordingly, we conclude that the Appellate Court, in the absence of a clear constitutional violation that clearly deprived the defendant of a fair trial, properly rejected the defendant's claim of prosecutorial misconduct.[10]

The judgment of the Appellate Court is affirmed.

In this opinion BORDEN and PALMER, Js., concurred.

McDONALD, J., with whom BERDON, J., joins, dissenting. I would hold that the trial court abused its discretion in denying the defendant the opportunity to cross-examine Darline about her concerns that one or more family members may have sexually abused her then nine year old niece, M. On direct examination, Darline testified that she had suspected that M had been sexually abused and questioned her. Darline testified that, at that time, M accused "Rick," the defendant, of sexual abuse. Darline also testified that when she learned that M had been sexually abused, she wanted to find out the identity of the abuser because "if it was somebody in the family, I wanted to know to protect her."

There was sufficient evidence of familial sexual abuse in the record to allow the defendant to pursue a line of questioning challenging Darline's credibility and

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to falsely implicate him and implied that the state's witnesses improperly influenced M to accuse him. Because we have concluded that the state did not improperly take advantage of the trial court's exclusion of evidence, we do not consider whether the defendant invited the subject response.

[10] See footnote 6 of this opinion.

to inquire about any influence that family involvement may have had upon Darline's questioning of M. The record reflects that M had accused three family members of sexual assault or sexual advances. The state's attorney disclosed to the defendant during the trial that M recently had accused two cousins of sexual assault. M had accused her adult cousin, who, indeed, shares the same nickname as the defendant, Rick, and her cousin Rick later admitted to abusing M sexually. At one time, M had indicated to the state's attorney that her cousin "Rick" had sexually abused her immediately before telling Darline about the alleged abuse by "Rick," the defendant. M also accused a teenage cousin, Darline's son, of sexually assaulting her. Finally, on the day Darline testified, the state's attorney disclosed evidence[1] that Darline's husband, Romeo, had made sexual advances to M sometime before Darline's questioning of M. The jury, however, never learned of M's allegation concerning Romeo's sexual advances or of any of M's allegations of other familial sexual abuse.

Contrary to the characterizations of the trial court, the defendant was not claiming third party culpability; rather, the defendant argued that, regardless of who abused M, Darline was concerned with protecting her family and may have been motivated to attempt to guide M's identification to avoid an accusation of one or more family members.

I would conclude that the trial court unduly restricted the defendant's cross-examination of Darline. Evidence concerning Darline's knowledge of familial sexual abuse would shed light on the

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[1] This evidence consisted of notes of M's aunt, Lisa. These notes indicated that Darline's ex-husband, Romeo, had made sexual advances to M while he was married to Darline.

credibility of her testimony that she was not covering up for family members when she questioned M.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." (Internal quotation marks omitted.) *State v. Sullivan*, 244 Conn. 640, 674 n.11, 712 A.2d 919 (1998) (Berdon, J., dissenting), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). "The confrontation clause of the sixth amendment [to the United States constitution] requires that the defendant be accorded some irreducible minimum of cross-examination into matters affecting the reliability and credibility of the state's witnesses." *State v. Ortiz*, 198 Conn. 220, 224, 502 A.2d 400 (1985). "Cross-examination concerning motive, interest, bias or prejudice ... is a matter of right and may not be unduly restricted." (Internal quotation marks omitted.) *State v. Lee*, 229 Conn. 60, 70, 640 A.2d 553 (1994). "Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." (Internal quotation marks omitted.) *State v. Santiago*, 224 Conn. 325, 332, 618 A.2d 32 (1992).

During closing arguments, the state's attorney repeatedly urged the jury to infer that M's allegations against the defendant were credible because there was no evidence that Darline had a motive to influence M's accusation. The state's attorney repeatedly asked the

jury why Darline would make something up against someone who had not been around her family for over two years. Specifically, the state's attorney stated in reference to Darline: "What kind of bias, interest does she have against this defendant?" The state's attorney also argued to the jury that, if the jury suspected that Darline was "covering for someone, someone in her family or something like that ... why did we even hear about this at all? ... You'd never [have] heard about this. Why bring this whole thing under scrutiny? So that's another reason why Darline didn't make this up and feed it to [M]." This argument encouraged the jury to infer that M had never accused a family member of sexual abuse.

The defendant failed to preserve properly his evidentiary claim and now seeks review under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), claiming that he was deprived of a fair trial. The combined effect of the evidentiary ruling and the closing arguments of the state's attorney "so compromised the integrity of the trial as to call into question the reliability of the verdict." *State v. Watson*, 251 Conn. 220, 740 A.2d 832 (1999). In my view, the defendant has satisfied *Golding* and I would order a new trial.

Accordingly, I dissent.

APPENDIX B

IN THE APPELLATE COURT
OF THE STATE OF CONNECTICUT

STATE OF CONNECTICUT v. RICHARD E. PROVOST

(AC 15651)

Spear, Dupont and Daly, Js.

Argued January 12 – officially released June 9, 1998

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before *Schimelman, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Sheila A. Huddleston, with whom were *Charles L. Howard* and, on the brief, *James W. Bergenn* and *Tracey M. Lane*, certified legal intern, for appellant (defendant).

Judith Rossi, senior assistant state's attorney, with whom were *Kevin Murphy*, assistant state's attorney, and, on the brief, *James Thomas*, state's attorney, for appellee (state).

Opinion

SPEAR, J. The defendant, Richard Provost, appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the first degree in

violation of General Statutes § 53a-70 (a)(2)[1] and risk of injury to a child in violation of General Statutes § 53-21.[2] The defendant claims that the trial court improperly (1) precluded the cross-examination of a prosecution witness regarding her credibility in violation of the defendant's fundamental right to confront witnesses pursuant to both the sixth amendment to the United States constitution and article first, § 8, of the constitution of Connecticut and (2) permitted the prosecution to engage in misconduct during closing argument in violation of the defendant's due process right to a fair trial.[3] We affirm the judgment of the trial court.

The jury reasonably could have found the following relevant facts. During 1990 through 1991, the victim, M, a minor female, lived with her mother,

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[1] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person ... (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person. . . ."

[2] General Statutes § 53-21 provides: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, shall be guilty of a class C felony."

[3] The defendant did not provide a separate analysis of his state constitutional claims, as is required by *State v. Geisler*, 25 Conn. App. 282, 283 n. 2, 594 A.2d 985 (1991), aff'd, 222 Conn. 672, 610 A.2d 1225 (1992). We, therefore, review only his federal constitutional claims.

J. In the winter of 1990, shortly before M's sixth birthday, J began dating the defendant, who was known to M as Rick. J often allowed the defendant to take M with him while he did errands, played racquetball, rode his motorcycle, and, on several occasions, the defendant was alone with M at his residence. J ended her relationship with the defendant in November, 1991.

In January, 1994, M began exhibiting suicidal tendencies and a violent temper, often running away from home. J took M to the Wheeler Clinic in Plainville for a psychiatric evaluation. During the visit, M became severely agitated, had to be restrained, and was subsequently admitted to Mount Sinai Hospital in Hartford. Upon M's discharge from the hospital three days later, J and her sister, Darline, were informed by the hospital staff that M had a yeast infection and blood in her urine.

Following her discharge from the hospital, M spent a night at Darline's home. After bathing M, Darline, concerned about M's infection, began to talk with M about "good touch and bad touch" in an effort to learn whether anyone had touched M inappropriately. M told Darline that "Rick, mom's boyfriend," had hurt her inside, kissed her on the mouth, and "[gone] to the bathroom" on her. Darline immediately informed J about M's disclosures, and then reported the allegations to the department of children and families on February 6, 1994.

After a police investigation, the defendant was arrested and subsequently found guilty of sexual assault in the first degree and risk of injury to a child. This appeal followed.

I

The defendant first claims that the trial court improperly restricted his cross-examination of Darline, to whom M had first revealed the sexual abuse. Specifically, the defendant contends that the trial court violated his sixth amendment right to confront his accusers by precluding the cross-examination of Darline with respect to her concern about whether any member of her family might have perpetrated the sexual abuse.

We first address the defendant's contention that this claim is of constitutional magnitude. At trial, the defendant characterized the nature and purpose of his cross-examination of Darline as relating to "credibility with what [Darline] can remember as to what she testified [to] on direct."[4] On appeal, however, the defendant for the first time characterizes this same cross-examination as an attempt to expose Darline's

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[4] The following colloquy between the court and defense counsel is excerpted from the trial transcript:

"The Court: I want to know what your claim is.

"[Defense Counsel]: Oh, my claim simply is: [Darline] was concerned about the members of her family who could have caused this particular yeast infection. She brought it up on direct. That means I certainly can probe her particular concern about her family. And [the defendant] is certainly not her family.

* * *

"The Court: Are you claiming anything other than third party culpability, so that I'm clear and the record is clear, counsel?"

"[Defense Counsel]: No, I'm claiming it for credibility with regard to what she can remember as to what she testified [to] on direct."

motive and interest in questioning M. This new claim is solely of an evidentiary nature. " 'Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label.' " *State v. Laws*, 36 Conn. App. 401, 411, 651 A.2d 273 (1994), *cert. denied*, 232 Conn. 921, 656 A.2d 671 (1995), *quoting State v. Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989). Because we do not review evidentiary claims that were not properly preserved; Practice Book (1998 Rev.) § 60-5 (formerly § 4061); *Dept. of Public Safety v. Freedom of Information Commission*, 242 Conn. 79, 91, 698 A.2d 803 (1997);[5] we will address only the issue of whether the cross-examination of Darline was improperly restricted with respect to the defendant's sixth amendment right, that is, the questioning of her credibility on direct examination.

" 'The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination. . . .' " *State v. Gould*, 241 Conn. 1, 15-16, 695 A.2d 1022 (1997). " 'The confrontation clause does not, however, suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . *State v. Barnes*, [232 Conn. 740, 746, 657 A.2d 611 (1995)]. . . . Moreover, it is well settled that questions of relevance are committed to the sound discretion of the trial court.' " (Citation omitted.) *Id.*, at 16, 695 A.2d 1022.

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[5] Review of an unpreserved claim under *State v. Golding, supra*, 213 Conn. 233, 567 A.2d 823, applies only when the claim is of a constitutional nature. Here, we have determined that the issue is purely an evidentiary question.

The defendant maintains that his questioning of Darline regarding M's infection was necessary cross-examination because, on direct examination, Darline had raised that very issue with respect to her concern that a family member may have been involved. We disagree. At trial, Darline specifically challenged this interpretation of her testimony.[6] Our review of the record reveals that the trial court sustained numerous objections from the prosecution on relevancy grounds because the defendant failed both to explain how the questions were relevant to Darline's credibility and to lay the requisite evidentiary foundation that would

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[6] The following trial testimony is excerpted from the transcript of the cross-examination of Darline:

"Q. And you asked her if somebody had sexually molested her?

"A. I didn't ask her that directly, no.

"Q. Well, you said you wanted to know whether it was somebody in your family. That's what you told us on direct.

"[Assistant State's Attorney]: I object. That was not--

"The Court: Excuse me. I think, again, the witness can indicate--

"[Assistant State's Attorney]: All right.

"The Court:--if she disagrees. And I think the witness is indicating that you disagree. Is that right, [Darline]?"

"[Darline]: Yes.

"The Court: Okay.

"Q. So if I wrote down 'if it was somebody in the family' that you testified to, then I'd be wrong.

"A. I did not testify that it was somebody in the family. I testified that I was afraid who it might be. And if it was somebody in the family, I wanted to know to protect her."

have allowed the questioning of Darline to evolve into an issue of third party culpability.[7]

It is well settled that "evidence of third party culpability must directly connect the third party to the crime. It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . . Unless the direct connection exists, it is within the discretion of the trial court to refuse to admit such evidence. . . . *State v. Colton*, 227 Conn. 231, 258, 630 A.2d 577 (1993)." (Internal quotation marks omitted.) *State v. Guess*, 44 Conn. App. 790, 811, 692 A.2d 849, *cert. granted on other grounds*, 242 Conn. 902, 697 A.2d 688 (1997).

Here, despite the court's request for an offer of proof, the defendant offered no evidence to connect a third party directly to M's alleged sexual abuse. Moreover, there was no evidence to suggest that M was in any way confused or uncertain about her statement that the alleged perpetrator was the defendant. Not only did the defendant misinterpret Darline's testimony when she stated that she simply asked M who had touched her, but the attempted questioning of Darline with respect to other family members was clearly an attempt to inculpate a third party, for which no direct evidence was proffered. Accordingly, we conclude that the court properly exercised its discretion in precluding the defendant from questioning Darline about other family members on

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[7] The following statement was made by the court to defense counsel during the cross-examination of Darline: "I'll let you have your say. But let me tell you what my concern is. We're not going to get into third party culpability unless you can show me something more directly than the fact that there may be other people in the house here."

cross-examination. This proper exercise of discretion did not violate the defendant's constitutional right to confrontation.

II

The defendant next claims that the trial court improperly permitted the prosecution to engage in misconduct during its closing argument, depriving the defendant of his due process right to a fair trial in violation of the sixth and fourteenth amendments to both the United States constitution and article first, § 8, of the constitution of Connecticut.[8] Specifically, the defendant contends that during closing argument the prosecutor (1) made "numerous improper, inaccurate, and highly prejudicial remarks" while repeatedly asking the jury to draw inferences that he knew to be false and (2) improperly shifted the burden of proof to the defendant. The defendant concedes that this misconduct claim was unpreserved, and he now seeks review of this claim under either *State v. Golding*, *supra*, 213 Conn. 233, 567 A.2d 823, or the plain error doctrine pursuant to Practice Book (1998 Rev.) § 60-5 (formerly § 4061). Although the first two prongs of *Golding* are satisfied here, we find no merit to the claim pursuant to the third prong of Golding.[9]

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[8] See footnote 3.

[9] Under *State v. Golding*, *supra*, 213 Conn. at 239-40, 567 A.2d 823, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any of these conditions, the defendant's claim will fail."

Finally, the conduct that the defendant challenges in this case does not rise to the level of plain error.[10]

A

We have stated that "[p]rosecutorial misconduct can occur in the course of closing argument. . . . In order to deprive a defendant of his constitutional right to a fair trial, however, the prosecutor's conduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . We do not focus alone, however, on the conduct of the prosecutor. The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial misconduct." (Citation omitted; internal quotation marks omitted.) *State v. Garrett*, 42 Conn. App. 507, 515, 681 A.2d 362, *cert. denied*, 239 Conn. at 928-29, 683 A.2d 398 (1996).

Here, the defendant challenges the prosecutor's conduct solely as it related to closing argument. In determining whether this claim of prosecutorial misconduct deprived the defendant of his due process right to a fair trial, we must first decide whether the prosecutor's remarks were, in fact, improper, and, if so, whether they substantially prejudiced the defendant. *State v. Oehman*, 212 Conn. 325, 336, 562 A.2d 493 (1989). In so doing, "we focus on several factors: (1) the extent to which the misconduct was

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[10] The defendant here merely asserts plain error and does not brief any plain error issues for our review. Further, plain error review " 'is reserved for those truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.'" *State v. Austin*, 244 Conn. 226, 241, 710 A.2d 732 (1998) *quoting State v. Ortiz*, 217 Conn. 648, 659-60, 588 A.2d 127 (1991). This is not such a case.

invited by defense conduct or argument; (2) the severity of the conduct; (3) the frequency of the conduct; (4) the centrality of the misconduct to the critical issues of the case; (5) the strength of the curative instructions adopted; and (6) the strength of the state's case." *State v. Williams*, 41 Conn. App. 180, 190, 674 A.2d 1372, *cert. denied*, 237 Conn. 925, 677 A.2d 950 (1996).

We first consider the defendant's claim that the prosecutor's closing argument was so misleading to the jury that it amounted to an unconstitutional denial of due process.[11] Specifically, the defendant contends that "[i]t was unfair, as a threshold matter, to argue that the defendant's guilt was established by the absence of evidence that the prosecutor had [succeeded] in excluding on the ground that it was irrelevant." While the defendant argues that several statements that were made by the prosecutor during closing argument were improper,[12] he is referring in

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[11] In his further attempt to advance what we interpret as a third party culpability theory, the defendant also contends that the prosecutor's conduct during closing argument amounted to misconduct because the prosecutor knew that M had recently accused a cousin of sexually assaulting her. We note, however, that the defendant neither offered any evidence with respect to that fact, nor laid the requisite foundation for the admission of evidence to that effect. Accordingly, the prosecutor's mere awareness of that allegation would not preclude his reminding the jury that no evidence had been admitted to suggest that anyone other than the defendant had committed the sexual abuse.

[12] The defendant also argues that it amounted to misconduct for the prosecutor to argue that, if M had accused a family member, namely, Darline's son, Darline simply would not have reported the abuse. The defendant opened the door to this issue by testifying that Darline's son had had intercourse with M when she was four years old. Because "counsel may comment upon facts properly in evidence and reasonable inferences drawn therefrom"; *State v. Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095

this claim to the fact that the prosecutor successfully argued to prevent the admission of evidence regarding both Darline's and M's motives to lie. The problem with the defendant's claim is that excluded evidence does not exist at all, for purposes of closing arguments. It cannot be blatantly egregious, therefore, to address such an absence of evidence, notwithstanding the manner by which it was excluded. Further, it is well established that "in addressing the jury [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State v. Richardson*, 214 Conn. 752, 760, 574 A.2d 182 (1990)..

Because the challenged conduct occurred solely during the prosecutor's closing argument, by definition it did not evince a pattern of conduct that was repeated throughout the trial. Further, for the reasons that we have discussed, the prosecutor's remarks during closing argument did not rise to the level of blatantly egregious misconduct that would implicate the defendant's constitutional right to due process. Accordingly, we conclude that this unpreserved claim is without merit.

B

Finally, the defendant argues that the prosecution improperly shifted the burden of proof to him by implying, in closing argument, that the defendant had the burden of proving that the child or

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(1977); it did not amount to misconduct for the prosecutor to invite the jury to infer that the abuse would not as likely have been reported if M had accused a family member.

her aunt had deliberately fabricated the charges against him. We disagree.

Our review of the record reveals that the state's attorney implied no such thing, and, in fact, underscored the state's burden of proof.[13] Moreover, the trial court instructed the jury regarding the presumption of innocence, the importance of considering all of the evidence in reaching a decision, and, most important, the state's burden to prove each and every element of the crime charged beyond a reasonable doubt. Because "we presume, absent a fair indication to the contrary, that the jury followed the instruction of the court as to the law"; *State v. Lasky*, 43 Conn. App. 619, 629, 685 A.2d 336 (1996), *cert. denied*, 239 Conn. 959, 688 A.2d 328 (1997); we conclude that the burden of proof properly remained on the state to prove each and every element of the crimes charged beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other judges concurred.

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[13] The following is excerpted from the transcript of the prosecution's closing argument: "The Judge will tell you about reasonable doubt. You look at the facts that are proved and you give the defendant the benefit of the doubt. And you say there's--if there are any facts that have been proved, which are consistent with the defendant's innocence, then you must find him not guilty."

APPENDIX C

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 16012

STATE OF CONNECTICUT

v.

RICHARD PROVOST : FEBRUARY 10, 2000

ORDER

THE MOTION OF THE DEFENDANT, FILED DECEMBER 10, 1999, FOR REARGUMENT AND RECONSIDERATION, OR, IN THE ALTERNATIVE, FOR REARGUMENT AND RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED **DENIED**. NORCOTT AND SULLIVAN, JS., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

S/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: MARCH 9, 2000.
SHIPMAN AND GOODWIN, LLP
JUDITH I. ROSSI, ASSISTANT STATE'S ATTORNEY
CLERK, HARTFORD J.D. (CR94-0087636T)
HON. STUART M. SCHIMELMAN
RJD

213/991217